

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-213401.2

DATE: June 19, 1984

MATTER OF: Department of the Air Force--Request for Reconsideration

DIGEST:

1. GAO withdraws its prior recommendation that an existing contract be terminated for the convenience of the government and a new award made to the successful protester since the contracting agency has established that termination would not be in the government's best interest because of prohibitive attendant costs and additional delays affecting project completion.
2. Bid preparation costs may be recovered if the contracting officer's actions were unreasonable or contrary to law or regulation, and precluded the claimant from receiving an award, so that the fact that the contracting officer's actions were taken in good faith is not determinative of the right to reimbursement.
3. There is no legal basis to pay anticipated profits to an unsuccessful bidder.

The Department of the Air Force requests reconsideration of the recommendation for corrective action in our decision Fischer-White-Rankin Contractors, Inc., B-213401, April 24, 1984, 84-1 CPD ¶ 471, in which we sustained a protest against the contracting officer's failure to reject the awardee's bid as ambiguous under invitation for bids (IFB) No. F05600-83-B-0055. We recommended that the Air Force terminate the existing contract with the awardee (Roberts Construction Company) for the convenience of the government, if termination was practicable in terms of attendant costs and the government's interest in timely project completion, and that a new contract be awarded to the protesting firm (Fischer).

If termination was not practicable, we recommended in the alternative that Fischer be reimbursed its bid preparation costs under the principle that a disappointed bidder is entitled to such reimbursement where the contracting agency acted in an arbitrary and capricious manner with respect to the firm's bid, and but for such agency action the bidder would have had a substantial chance of being awarded the contract.

The Air Force now advises that termination of the existing contract is not practicable because Roberts has completed 28 percent of the work, and has entered into approximately 30 existing subcontracts with a total value of 2.4 million dollars. Additionally, the Air Force states that the original contract completion date has been extended from October 17, 1984 to December 17, 1984 because of delays caused by adverse weather conditions this past winter, and that termination now and award of a new contract to Fischer would force extension of the completion schedule into next winter when even more delays can be anticipated.

The Air Force also objects to the granting of bid preparation costs to Fischer because it disputes our conclusion that the contracting officer acted in an arbitrary and capricious manner by failing to reject Roberts' bid as ambiguous.

We withdraw our recommendation that the existing contract be terminated, since we have no reason to dispute the Air Force's position that termination of the existing contract will be prohibitive in terms of both costs and additional delays in project completion. We affirm our holding on bid preparation costs, however.

In its bid, Roberts had stated a price for a particular additive item, but had also acknowledged an amendment that deleted the additive and included it, instead, as part of the basic bid. Roberts then advised the contracting officer that the price shown for the additive was for informational purposes only, and that that amount was included in its basic bid, an interpretation of the bid that the contracting officer accepted. Fischer, however, asserted that the bid was ambiguous and should be rejected since, notwithstanding Roberts' acknowledgment of the amendment, by pricing the additive item, it was unclear what Roberts had intended as its basic bid. Essentially, Fischer urged a second interpretation of the bid: that Roberts had not included the price for the additive item in its basic bid, but rather had offered it as a separate price which therefore had to be added to the

basic bid for evaluation purposes. Under this second interpretation, Roberts' bid would not be low.¹

We agreed with Fischer that its interpretation of Roberts' bid was as reasonable as was the Air Force's. We sustained the protest on the basis of the principle that when a bid is subject to more than one reasonable interpretation, only one of which makes the bid low, the bid must be rejected as ambiguous, since it would be prejudicial to the other bidders to allow the bidder to select and confirm the lower of the reasonable prices.

The Air Force believes that the contracting officer's action could not have been arbitrary and capricious so as to justify a grant of bid preparation costs if, as we stated in our April 24 decision, his interpretation of Roberts' bid was reasonable. The agency argues:

" . . . the contracting officer acted without malice and without intentional wrongdoing. Moreover, there was no deliberate attempt to circumvent the integrity of the bidding system or prejudice any other bidder. We can only conclude that the actions of the contracting officer were not arbitrary or capricious as you have asserted."

A contracting officer's motivation, however, is not the determinative factor in deciding whether a bidder is entitled to bid preparation costs. The standard under which a firm is entitled to be reimbursed the costs of preparing its bid is that the government, through arbitrary and capricious action, has breached the implied condition of every IFB that each bid submitted will be fairly and honestly considered. There are four specific grounds for recovery under that standard: where there has been subjective bad faith on the part of the procuring officials; where there is no reasonable basis for an administrative decision; where the proof of an error necessary for recovery shows that the procuring officials have exceeded their statutory or regulatory discretion; or where there has been a violation of pertinent statutes or regulations. Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974).

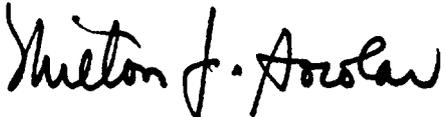
¹Because of the funding available, bids were evaluated on the basis of the basic bid only.

Thus, even though the Air Force's contracting officer may have acted in good faith--it was not our intent to suggest otherwise--bid preparation costs may be recovered if his actions were unreasonable or contrary to law or regulation. Roberts' bid clearly was subject to two reasonable interpretations and therefore was an ambiguous bid, and it is well-settled that if an ambiguous bid is low under only one of its reasonable interpretations the bid must be rejected. See Bill Strong Enterprises, Inc., B-200546, March 5, 1981, 81-1 CPD ¶ 173. As we indicated in our prior decision, an agency cannot simply select, in that situation, the interpretation of a nonresponsive ambiguous bid that saves the agency money in relation to the competition.

We note that in support of its position, the Air Force refers us to our decision in Harco Inc.--Claim for Legal Fees and Bid Preparation Costs, B-189045, Jan 26, 1979, 79-1 CPD ¶ 55, in which we held that a contracting officer's failure to consider a reasonable alternate interpretation of the low bidder's prebid-opening telegram which made the bid nonresponsive was not an action so arbitrary and capricious as to warrant the award of bid preparation costs. That case, which does not conclude that such costs are always unrecoverable in situations involving an agency's response to a potential bid ambiguity, is distinguishable on the facts from the present matter because the contracting officer there had no other evidence apart from the ambiguous language of the telegram to indicate the bidder's possible contrary intent regarding its offered price. Here, not only had Roberts expressly priced the additive item, the firm had also directly reflected that figure in its total bid. Therefore, because of Roberts' carelessly prepared bid, the Air Force's contracting officer had more reason to suspect the presence of an equally plausible interpretation of the bidder's intent than did the contracting officer in Harco, and his failure to acknowledge that alternate interpretation thus rises to the level of action which warrants the granting of bid preparation costs.

Finally, in comments on the Air Force's reconsideration request, Fischer asks to be paid its anticipated profits on the project. There is no legal basis, however, that would permit such payment. See Power Systems--Claim for Costs, B-210032.2, March 26, 1984, 84-1 CPD ¶ 344.

Accordingly, we withdraw our recommendation that the contract be terminated for the convenience of the government, but we affirm our alternative recommendation that Fischer be granted its bid preparation costs.

for 
Comptroller General
of the United States